United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

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75-1273

In The

United States Court of Appeals

For The Second Circuit

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

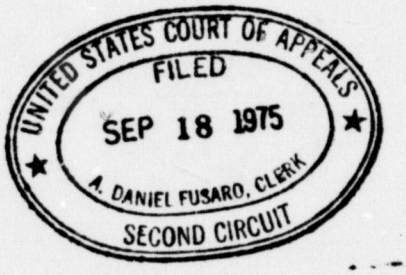
vs.

LEON ROGERS,

Defendant-Appellant.

On Appeal from the United States District Court for the Southern District of New York

BRIEF FOR DEFENDANT-APPELLANT



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In The

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 75 - 1273

UNITED STATES OF AMERICA,

Plaintiff-Appellee

-against-

LEON ROGERS,

Defendant Appellant

BRIEF FOR APPELLANT LEON ROGERS

Preliminary Statement

The appellant, Leon Rogers, appeals from a Judgment of Conviction entered in the United States District Court for the Southern District of New York (Bonsal J.). After a trial a jury found the appellant guilty of counts one and four of indictment 75 CRIM 402. Count one charged the appellant with conspiring

with others to violate 18 U.S.C. §§ 659 and 2 in violation of 18 U.S.C. § 371. Count four charged Leon Rogers with stealing a motor truck carrying fish valued at over $100 which were moving in interstate commerce on January 22, 1973. Mr. Rogers was not named in counts two, three and five of the indictment and the government did not claim that Mr. Rogers participated in the other hijacking which was the subject matter of counts two and three.

After his conviction and on July 14, 1975, the Court sentenced the appellant to imprisonment for three years on each count to run concurrently.

STATEMENT OF FACTS

Mr. Alfred Wade, a truckdriver for Connecticut Seafood Transport, testified that after he picked up fish from Merchants Refrigeration Company in New York his truck was hijacked, on January 22, 1973, en route to Connecticut by four men. Mr. Wade was unable to identify any of the hijackers (*TR 38-43).

When Mr. Wade was questioned regarding the value of the shipment the defense objected on the grounds that the witness was not qualified as an expert to answer (TR 45). Thereafter, the witness was shown Governments Exhibit 5 for identification and asked: "Could you identify those documents?" The witness replied: "Well, not exactly because my father took care of all that." The witness then testified that the documents were "bills from the different companies." When asked whether those bills related to the shipment in question, the witness replied: "I believe so, yes." (TR 45). After being asked a leading question, the witness more positively identified the bills as relating to the shipment in question (TR 45). The documents were then offered in evidence and the defense objected on the grounds that a proper foundation had not been laid. The Court then asked the witness, "I take it these are documents that the company keeps in the regular course of its business, is that right?" The witness replied, "yes" and the defense requested a voir dise (TR 46).

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*TR - Transcript of the trial minutes.

The bills were then received in evidence as business records over the defenses objection. The bills,which were the only evidence of value,were then read to the jury.

On Cross examination, the witness, Mr. Wade, testified that the Governments Exhibit 5 was sent to his father, that he had nothing to do with those papers and that he had "no idea" of the value of the goods in his truck when the truck was hijacked. (TR 51-52).

Carlton Boyd, James Dixon, and Charles Cooper testified that the appellant Leon Rogers joined their conspiracy to hijack truck after the first hijacking and that Mr. Rogers participated in hijacking the truck on January 22, 1973. The appellant testified and denied any complicity in the crimes charged.

At the end of the entire case, trial counsel for the appellant renewed his Rule 29 motion for a Judgment of Acquittal on the ground that the evidence regarding the value of the merchandise stolen was insufficient to sustain the conviction of the crime charged. The Court denied the motion stating "I haven't got any problem with that. The jury will decide on the value." (TR 378).

In instructing the jury on the question of value, the Court stated:

> "The second element which the Government must prove is that the value of the fish was greater than a hundred dollars. That is, the contents of the truck. Well, there was a certain amount of evidence

on that. As I recall it, these were pretty big trucks, and I think you can probably pretty much use your common sense on that and determine on the evidence whether they were worth more than a hundred dollars. I would assume so; I don't know, but I would assume so myself." (TR 493)

"As I recall it, the Arrow truck was going from New York to Pawtucket and the seafood truck was going from New York to Connecticut, and I told you that was interstate commerce. That is the first element.

The second element is the value of the goods was greater than $100. Well, I think we had some testimony on that, I talked about that. I don't think that there is a serious question about that element."(TR 497)

Thereafter, the jury returned a verdict of guilty on both counts of the indictment wherein the appellant was named. It is from that conviction that the appellant appeals.

QUESTIONS PRESENTED

(1) Whether the bills introduced into evidence as Governments Exhibit 5 were business records within the meaning of 28 U.S.C. § 1732?

(2) Whether the trial Court's instructions to the jury on the element of value was error?

P O I N T -1

THE INVOICES WERE INADMISSIBLE UNDER THE FEDERAL BUSINESS RECORDS ACT

The Federal Business Records Act, 28 U.S.C. § 1732 provides, in pertinent part, as follows:

> "In any court of the United States---any writing or record whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event shall be admissible as evidence of such act, transaction, occurrence, or event, if made in regular course of any business and if it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence, or event or within a reasonable time thereafter."

While it is clear that the person who actually prepared or kept the business records need not testify in order to admit the records, the person who testifies must be in a position to attest to their authenticity and be sufficiently familiar with that part of the business to testify that the record in question was made as a regular business practice. United States v. Rosenstein, 474 F 2d 705 (2 Cir. 1973); United States v. Dawson, 400 F 2d 194,199 (2 Cir. 1968). Simply stated, Mr. Wade, was not that person. When asked to identify the invoices in question he hesitated stating that his father took care of all that (TR 45) and that he had "nothing to do with those papers" (TR 51).

Moreover, Mr. Wade testified that the invoices were not prepared by his father or by his father's company, Connecticut Seafood

Transport, but rather were bills sent to his father by different companies (TR 45, 51). As this Court said in United States v. Rosenstein, 474 F 2d 705, 710 (2 Cir. 1973), "It must appear that the letter was written in the regular course of its authors business" before they are admissible as business records. See also Phillips v. United States, 356 F 2d 297 (9 Cir. 1965) cited with approval by this Court in United States v. Rosenstein, supra. In Phillips, letters written by the defendant's customers and found in the files of defendant's company were not admissible under 28 U.S.C. § 1732 since admissibility under that section requires that the documents must be shown to have been made in the regular course of the business of the company in whose files they are found.

It is clear under our fact situation that the author of the bills was not Connecticut Seafood Transport and on that ground alone the bills should have been excluded.

Furthermore, for a record to be admissible under 28 U.S.C. § 1732 there must be testimony to establish that the record was made in the ordinary course of business, Cassady v. United States, 395 F2d 205 (5 Cir. 1968) that it was kept in the regular course of business United States v. Barson, 434 F2d 127, 128 (5 Cir.1970) and testimony by the custodian to adequately authenticate the record and explain the efforts employed to ensure its accuracy United States v. Dawson, 400 F2d 194, 198, 199 (2 Cir. 1968);

United States v. Blake, 488 F2d 101, 105 (5 Cir. 1973).

Under the facts herein, the only question asked by the Court prior to admitting the record was "I take it these are documents that the company keeps in the regular course of its business, is that right?" to which the witness answered, "yes". (TR 46). We submit that the foregoing does not establish a sufficient foundation for the documents' admissibility.

Accordingly, we submit that the documents were inadmissible since (1) the witness was not sufficiently familiar with that part of the business to testify that the record was kept in the regular course; (2) that the record was not made in the regular course of Connecticut Seafood Transport and (3) that a proper foundation was not and could not have been laid by Mr. Wade's testimony.

United States v. Berkowitz, 429 F2d 921 (1st Cir. 1970) is directly on point with our position. There, the Court held that an invoice used to prove value was improperly admitted into evidence as a business record under 28 U.S.C. § 1732. In reaching that result the Court stated at page 927 of 429 F2d:

> "The invoice introduced here as evidence of the value of the slippers was not a record 'made' by Hemingway in the regular course of its business. It was merely a copy of an invoice made by someone else, sent on request to Hemingway, and kept by it for filing. The fact that Hemingway relied on the invoice to establish the amount of the loss does not supply the critical omission of any evidence that Phoenix

> made and preserved the invoice in the regular course of its business. Alfonso could testify to the receipt and retention of the invoice but not to its trustworthiness as a business record made by Phoenix Slipper Company."

Accordingly, the case should be reversed and remanded for trial or remanded to the district court for imposition of a lesser sentence as provided in the statute.

P O I N T II

THE COURT'S INSTRUCTION TO THE JURY ON THE ELEMENT OF VALUE WAS ERROR

After instructing the jury that the Government must prove that the value of the fish in the truck exceeded $100 the Court said:

> "As I recall it these are pretty big trucks and I think you can probably pretty much use your common sense on that and determine on the evidence whether they were worth more than a hundred dollars I would assume so; I don't know, but I would assume so myself."(Emphasis Added) (TR 493)

The Court also said in discussing the element of value:

> "I don't think that there is a serious question about that element." (TR 497)

We submit that the foregoing instructions was error. Section 659 provides that where the value of the goods does not exceed $100 imprisonment may not exceed one year as compared to 10 years if the value of the goods exceeds $100. The punishment under 18 U.S.C. § 371, the conspiracy statute would also be reduced. As the Court said in Robinson v. United States, 333 F2d 323, 326 (8 Cir. 1964):

> "It is well settled that where the grade of larceny and consequently the punishment, depend on the value of the property, it is essential that the value of the property not only be alleged but proven Cartwright v. Untied States, 146 F2d 133, 135 (5 Cir. 1944)."

Under the facts herein there was a serious issue as to whether the Government proved beyond a reasonable doubt that the value of the goods exceeded $100. Mr. Wade testified that he had "no idea" of the value of the goods. There was a question whether the bills which were dated 1 and 2 days after the shipment even related to the shipment. When Mr. Wade was asked initially whether he could even identify the bill he stated, "Well not exactly because my father took care of all that." (TR 45). Moreover, the defendant's motion for a judgment of acquittal was based on insufficient proof of value.

While we concede that the jury could have found that the bills sufficiently proved value exceeding $100, we contend that that issue should properly have been left for the jury. The Court's charge on that element left the jury no issue to decide. Accordingly, we contend that the conviction should be reversed and remanded for a new trial or in the alternative that the punishment of three years imprisonment should be reduced to one year imprisonment. Cf. Robinson v. United States, 333 F2d 323 (8 Cir. 1964).

CONCLUSION

The conviction should be reversed and the case remanded to the district court for trial or for imposition of a lesser sentence.

Respectfully submitted,

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A 202 Affidavit of Personal Service of Papers H LUTZ APPELLATE PRINTERS, INC.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA, **Plaintiff-Appellee,** *against* **LEON ROGERS,** **Defendant-Appellant.**	*Index No.* *Affidavit of Personal Service*

STATE OF NEW YORK, COUNTY OF NEW YORK *ss.:*

James A. Steele *being duly sworn,*

deposes and says that deponent is not a party to the action, is over 18 years of age and resides at
310 W. 146th St., New York, N. Y.

That on the 18th *day of* Sept *1975 at* **1 St. Andrews Plaza, N.Y., N.Y.**

deponent served the annexed Briefs *upon*
Paul Curran

the **U.S. Attorney** *in this action by delivering a true copy thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the* *herein,*

James A. Steele
Print name beneath signature
JAMES A. STEELE

Sworn to before me, this 18th
day of September *1975*

Robert T. Brin

ROBERT T. BRIN
NOTARY PUBLIC, State of New York
No. 31-0418950
Qualified in New York County
Commission Expires March 30, 1977